

STATE OF MINNESOTA
COUNTY OF HENNEPIN

PERSONAL INJURY
DISTRICT COURT

FOURTH JUDICIAL DISTRICT
COURT FILE: PI 86-18720

John P. [REDACTED],

Plaintiff,

vs.

Children's Theatre Company and School, a Minnesota Non-Profit Corporation; and John Clark Donahue, individually and as a member of the Board of Directors and Executive Committee at the Children's Theatre Company and School,

Defendants.

MEMORANDUM OF LAW

The following Memorandum is submitted by Defendant Children's Theatre Company and School (hereinafter "CTC") in opposition to Plaintiff's motion to assert a claim of punitive damages.

STATEMENT OF FACTS

This action arises out of alleged sexual interaction between Plaintiff, John P. [REDACTED], and John Clark Donahue. Defendant Donahue, at the time of the alleged sexual interaction was artistic director of CTC, a Minnesota nonprofit corporation. Plaintiff alleges in his complaint that CTC breached certain duties owed to him. Plaintiff now seeks to amend his complaint to add a claim for punitive damages against CTC.

From approximately 1962 to 1964, Defendant Donahue was employed by the Moppett Players, a theater group sponsored by the Pillsbury

Settlement House. In 1964, that theater group split-up with some members moving to St. Paul and other members acquiring space at the Minneapolis Art Institute. (Donahue Deposition at pp. 15, 16). The Minneapolis group eventually became known as the Children's Theatre Company of the Minnesota Institute of Arts. (Donahue Deposition at p. 20). Mr. Donahue became the artistic director. Initially, the Theatre Company reported to the director of the Art Institute who, in turn, reported to the Board of Directors of the Minneapolis Society of Fine Arts. The group eventually became a separate institution under the umbrella of the Minneapolis Society of Fine Arts. (Donahue Deposition at p. 24).

In 1975, the theater group broke away from the Society of Fine Arts and became a separate corporate entity, CTC. A new board of directors was formed and Mr. Donahue was hired as the artistic director of the new theatre company. (Donahue Deposition at pp. 29, 30). Obviously, the first involvement between Defendant CTC and Mr. Donahue occurred in 1975.

Plaintiff alleges that he had approximately 60 sexual encounters with Mr. Donahue from 1979 until 1983. Mr. Donahue, contrary to Plaintiff's assertion in his memorandum, admits to five or six encounters. (Donahue's Deposition at p. 61).

Plaintiff's claim for punitive damages against CTC is based on the following alleged circumstances:

1. Jacqui Smith, a member of the board of directors from approximately 1976 to September 1982, was advised by two 17-year-old males that they were "messing around" with John Donahue. (Smith Deposition at p. 15). This communication occurred in 1972 or 1973.

2. Members of the Executive Committee of CTC failed to take any action after being advised that the Bureau of Criminal Apprehension was investigating John Donahue.
3. John Donahue's prior criminal record was not discovered by CTC.
4. There were rumors that Donahue was involved in sexual relationships with juvenile males.

For the following reasons, none of the above circumstances establish prima facie evidence that the acts of CTC demonstrate a willful indifference to the rights or safety of Plaintiff.

LEGAL ARGUMENT

Minn. Stat. §549.19 provides that a plaintiff has a burden to show prima facie evidence of willful indifference by Defendant in order to assert a claim for punitive damages. Clearly, the legislature, in enacting Minn. Stat. §549.191, intended that punitive damages be allowed only in the most egregious of circumstances. In Wikert v. Northern Sand & Gravel, Inc., 402 N.W.2d 178 (Minn. App. 1987), the Minnesota Court of Appeals stated:

Punitive damages are an extraordinary remedy, and are awarded only where the harm complained of is the result of conduct done in malicious, willful, or reckless disregard of the rights of others. (Citation omitted).

Id. at 182.

The Wikert court held that something more than mere indifference to the rights and safety of others is necessary to support a claim for punitive damages. "There must be a maliciousness, an intentional or willful failure to inform or act, before imposing this form of deterrence

and extreme punishment." Id. at 183. In applying that standard to the case at hand, there is no question that Plaintiff's "evidence" is insufficient to meet his burden.

Plaintiff claims that he is entitled to punitive damages from CTC based on Jacqui Smith's failure to advise the Board of Directors of information she had received in 1972 or 1973 concerning Mr. Donahue's involvement with two 17-year-old males. While it is not clear in Plaintiff's memorandum, it must be assumed that Plaintiff is alleging that Ms. Smith had a duty to disseminate this information sometime after becoming a board member in 1976.

Ms. Smith is employed by Family and Children Services of Minneapolis as a family issue advocate. (Smith Deposition at pp. 4, 5). In 1972 or 1973, while several of Ms. Smith's children were involved with the Children's Theatre Company of the Minnesota Institute of Arts, two 17-year-old males told her that they had been "messing around" with John Donahue. Ms. Smith assumed this meant some sort of sexual relationship. (Smith Deposition at p. 16). Ms. Smith asked if these individuals wanted her to do anything with this information. They told her not to tell anyone. (Smith Deposition at p. 19).

In approximately 1976, Ms. Smith became a member of the Board of Directors of CTC. Sometime between 1976 and 1980, she reported the substance of the conversations with the two 17-year-old males to Deborah Anderson of the Hennepin County Attorney's Office. Subsequently, the County Attorney's Office conducted an investigation of Mr. Donahue but no evidence of wrongdoing was obtained. (Smith Deposition at p. 27). Ms. Smith never advised the Board of Directors or any employees of CTC of

this information. (Smith Deposition at p. 26). Contrary to Plaintiff's unsubstantiated assertion, there is no evidence that Ms. Smith ever received any other information or heard any rumors concerning Donahue's sexual involvement with juveniles until the Bureau of Criminal Apprehension (hereinafter "BCA") contacted her in late 1982 or 1983. (Smith Deposition at p. 20).

Even if it is assumed that there was an agency relationship between CTC and Ms. Smith, and that Ms. Smith's act of withholding the information was relative to the agency relationship, this does not give rise to a claim for punitive damages against CTC. Minn. Stat. §549.20, Subd. 2, governs a claim of punitive damages against a principal or corporation for acts of its agents. That statute provides in relevant part as follows:

Subd. 2. Punitive damages can properly be awarded against a master or principal because of an act done by an agent only if:

- (a) The principal authorized the doing and the manner of the act, or
- (b) The agent was unfit and the principal was reckless in employing the agent, or
- (c) The agent was employed in a managerial capacity and was acting in the scope of employment, or
- (d) The principal or a managerial agent of the principal ratified or approved the act.

None of the above-cited criteria are present in the instant case. CTC was never advised by Ms. Smith concerning her conversation with the two 17-year-old males. Clearly, CTC never authorized the act of withholding the information nor did it ever ratify or approve the act.

Finally, there is absolutely no showing that Ms. Smith was unfit to serve as a director or that she was ever employed in a managerial capacity with CTC. Therefore, the actions or inactions of Ms. Smith do not support a claim for punitive damages against CTC.

Even if Plaintiff proved the criteria set forth in Minn. Stat. §549.20, Subd. 2, was present, Plaintiff must also provide prima facie evidence that Ms. Smith's actions or failures to act were malicious or willfully indifferent. Clearly, Plaintiff cannot meet this burden. The unrefuted evidence shows that Ms. Smith reported the information to the County Attorney's Office and arranged a meeting between that office and students from the Theatre. (Smith Deposition at p. 21). These actions, in and of themselves, refute Plaintiff's contention that Ms. Smith was willfully indifferent to his rights and safety.

Plaintiff, in support of his motion, relies primarily on the action or inaction of CTC's corporate officers after they were informed of the BCA investigation. Contrary to Plaintiff's assertions, these officers were neither willfully indifferent nor malicious in their response to the BCA information.

In October 1982, Sarah Lawless, then executive director of CTC, was advised by the BCA that it was investigating Mr. Donahue's alleged sexual involvement with juveniles. Ms. Lawless notified officers of the corporation, including Jay Bush, Winthrop Rockwell, and A.L. Powell, of this investigation. The officers immediately retained Attorney Alan Cunningham to advise them how to proceed under the circumstances. (Powell Deposition at p. 16). Ms. Lawless informed the corporate officers that the BCA did not provide any specifics or details of the alleged sexual

misconduct. (Rockwell Deposition at p. 18). The BCA further advised that it was an ongoing investigation and any interference by CTC would give rise to charges of criminal obstruction. (Rockwell Deposition at p. 19). The BCA specifically suggested that CTC not talk with parents and students. (Rockwell Deposition at p. 18).

John Donahue was arrested in April 1984. During the 18 month period between being advised of the BCA investigation and Donahue's arrest, the corporate officers met on numerous occasions to discuss the situation. (Powell Deposition at p. 25). Mr. Cunningham remained in close contact with the BCA and there was full cooperation by the officers with the investigators. (Rockwell Deposition at p. 22). Throughout this period, the officers were never advised of any specific behavior and were never given the names of any children allegedly involved with Donahue. (Rockwell Deposition at p. 37).

The corporate officers considered conducting their own investigation of Mr. Donahue but concluded that such action would be contrary to the BCA's instructions. (Rockwell Deposition at p. 31). Mr. Rockwell testified that he felt a responsibility to inform parents and students but felt frustrated and helpless in light of the BCA's instructions. (Rockwell Deposition at p. 51).

Jay Bush, then financial officer of the corporation, testified that he was advised by Sarah Lawless that the BCA investigators said they wanted no public disclosure of the investigation. He stated that the corporate officers discussed giving a general notification of the investigation but believed it was not an option due to the BCA's instructions. (Bush Deposition at p. 37).

Mr. Powell testified that he was advised by Sarah Lawless that the BCA investigators stated that no students or parents were to be informed of the investigation. Alan Cunningham was told by the county attorney that if any evidence was found, the officers would be notified. (Powell Deposition at p. 31).

Plaintiff has not produced any evidence to dispute the testimony of Mr. Bush, Mr. Rockwell or Mr. Powell concerning the BCA's instructions. Plaintiff seems to suggest that the corporate officers were willfully indifferent because they followed the BCA's instructions. Plaintiff further suggests that by not taking action against Mr. Donahue, the officers were willfully indifferent. When asked if he or other corporate officers were aware of rumors concerning Donahue's alleged sexual misconduct, Mr. Rockwell testified:

No. I don't think the members--that was one of the questions that we asked ourselves was, is there any, do we have any information which would lead us to believe that there is anybody at risk here which would require us to take some action. And in the face again of a generalized accusation without specifics and in the face of a denial from a man whose word had been believed and had been reliable for many years, I think the conclusion was that there was not sufficient basis, you know, there was a sense of trying to balance the interests of the institution and the people involved in the institution with, you know, our kind of common law tradition of not convicting somebody until there's some facts to do it with. (Rockwell Deposition at p. 42).

The evidence, as presented to this court, establishes that the corporate officers acted reasonably and prudently in response to the BCA's investigation. In light of the fact that these officers were

advised to make no public disclosure and to take no action, their conduct certainly was not malicious nor willfully indifferent towards Plaintiff.

Plaintiff further alleges that punitive damages are recoverable because CTC failed to investigate Mr. Donahue's criminal background. Under the circumstances, this claim is ludicrous.

Fourteen years prior to his employment with CTC, Mr. Donahue was convicted of indecent exposure, a misdemeanor. (Donahue Deposition at p. 9).¹ Plaintiff asserts that CTC's failure to uncover this fact gives rise to a claim for punitive damages. The rule in Minnesota is clear. An employer has no duty, as a matter of law, to make inquiry concerning a prospective employee's criminal record. Ponticas v. K. M. S. Investments, 331 N.W.2d 907 (Minn. 1983). It is also apparent from the employment circumstances, that CTC had a sufficient basis to believe Mr. Donahue would be a reliable and fit employee. Mr. Donahue, prior to his employment with CTC, was artistic director of two theater companies that were, presumably, highly regarded in the community. Since there is no evidence to suggest that any board member involved in the hiring of Mr. Donahue had any reason to suspect any wrongdoing, there was no apparent need for a criminal background investigation.

Finally, Plaintiff alleges that punitive damages are recoverable because there were rumors concerning Mr. Donahue's interaction with male students. Plaintiff asserts that rumors are mentioned by Jacqui Smith, Deborah Anderson, and are contained in the BCA investigative file. Plaintiff further asserts, based on a BCA report, that Sarah Lawless

¹ Plaintiff alleges in his memorandum that Donahue was convicted of sodomy. Plaintiff's assertion is incorrect.

heard these rumors and confronted Donahue prior to 1982. Plaintiff, however, fails to offer any competent evidence that CTC, through its officers, had knowledge of these rumors. Plaintiff attempts to introduce one investigative report prepared by a BCA investigator. The information contained in that report cannot be used to support Plaintiff's motion. The Minnesota Court of Appeals, in Wood v. Astleford, 412 N.W.2d 753 (Minn. App. 1987), was faced with an almost identical issue. That case involved sexual abuse of juveniles by an employee of defendant's corporation. Plaintiff, in opposition to defendant's motion for summary judgment, argued that the court should take judicial notice of the BCA investigation file in order to show that the employee's sexual activities were foreseeable. The trial court rejected plaintiff's argument and the Court of Appeals, in affirming the trial court, held: "/t7o take judicial notice of the BCA file, however, would be an undue broadening of the doctrine and would probably be an abuse of discretion. (Footnote omitted). Id. at 758.

Even assuming that there is a basis for this Court to consider the BCA investigative report, the alleged statement contained therein is not *prima facie* evidence that Sarah Lawless acted with malice or willful indifference towards the rights or safety of Plaintiff. The report indicates that Ms. Lawless confronted Donahue and that Donahue emphatically denied that he had been sexually active with juveniles and that his sexual interaction was exclusively with consenting adults. There is no indication in the report when this alleged conversation between Ms. Lawless and Mr. Donahue occurred or the substance of the rumor. Plaintiff has the burden to show that Ms. Lawless was willfully indifferent

ent by not doing more than what is set forth in the investigative report. Plaintiff's vague and unsupported claim that Ms. Lawless should have done more with this information finds absolutely no support in the evidence before this Court.

Plaintiff also alleges that Deborah Anderson and Jacqui Smith heard rumors about Donahue's sexual involvement with juveniles. Deborah Anderson had no relation or connection to CTC. Whether she was aware of rumors concerning Mr. Donahue has no bearing on this issue. Plaintiff's allegation that Ms. Smith heard rumors is not supported by the evidence. Ms. Smith did not testify that she was aware of rumors about Mr. Donahue.

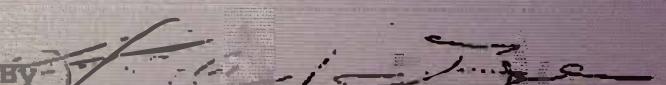
CONCLUSION

Plaintiff has the burden to present prima facie evidence that CTC acted with willful indifference towards his rights and safety. The evidence offered by Plaintiff is insufficient to meet this burden. Defendant CTC respectfully requests this Court to deny Plaintiff's motion.

²Mr. Donahue testified that Sarah Lawless never confronted him or discussed his sexual interaction with juvenile males. (Donahue Deposition at p. 82). Sarah Lawless now resides in Denver, Colorado. Her deposition has not been taken.

Respectfully submitted,

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